

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

September 22, 2008 Session

CIVIL CONSTRUCTORS, INC., ET AL. v. GEORGE HAYNES, III

**Direct Appeal from the Chancery Court for Williamson County
No. 32951 R. E. Lee Davies, Chancellor**

**No. M2008-00165-WC-R3-WC - Mailed - January 8, 2009
Filed - March 19, 2009**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee was injured on the job, when the dump truck he was driving overturned. Employer denied liability, asserting that the injuries were the direct result of willful misconduct by Employee. The trial court found in favor of Employer on that issue, and denied benefits. Employee has appealed, contending that the evidence preponderates against the trial court's finding. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2008) Appeal as of Right; Judgment of the Chancery Court Affirmed

ALLEN W. WALLACE, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and JON KERRY BLACKWOOD, SR. J., joined.

Barbara G. Medley, Lewisburg, Tennessee for the appellant, George Haynes, III.

Frederick W. Hodge and Daniel W. Starnes, Nashville, Tennessee for the appellees, Civil Constructors, Inc., and St. Paul Travelers.

MEMORANDUM OPINION

Factual and Procedural Background

Civil Constructors ("Employer") is a contractor, which was building a residential subdivision in Williamson County. George Haynes ("Employee") was a dump truck driver working for Employer at that site. He suffered injuries to his shoulder, sternum, ribs and back on June 16, 2006 when his truck overturned. The accident occurred as he was attempting to empty a load of dirt and construction waste at a berm created for that purpose on the construction site. The berm was adjacent to an unpaved road on the side of a hill. Employee was backing up onto the berm at an

angle when his truck became unsteady and overturned.

Employee's supervisor, Pat LaFever, testified that, on the morning the accident occurred, he had specifically instructed Employee not to back his truck onto the berm because it was unstable. LaFever testified that he told Employee to empty his truck into a ditch at the bottom of the berm, where a bulldozer would then move the material to the berm. Employee agreed that a conversation took place. However, his version differed from LaFever's. Employee testified that he told LaFever that he believed it was unsafe to empty the truck at the ditch area, because it put the truck in an unstable position. He stated that he told LaFever that he thought it was safer to back the truck onto the berm, and that LaFever responded by telling him to empty the truck in the manner he thought safest. Employee also testified that LaFever had previously instructed him not to empty his truck onto the road itself, because it had already been compacted in preparation for eventual paving. LaFever testified that Employee "could have dumped on the road. He was supposed to dump in the ditch."

Eleven days prior to his injury, on June 5, 2006, Employee's truck became unstable and tilted to one side while he was attempting to back it onto the berm. A backhoe was used to empty the truck, and the vehicle sustained damage as a result of the incident. Employee was not injured. Employee denied that he received any warning or reprimand as a result of this incident. Mike Woods, also a supervisor for Employer, testified that he verbally reprimanded Employee after the incident, and warned him "that he would be fired if he was backed up there on that [berm] again and tore the truck up like he did." Mr. LaFever testified that when he spoke to Employee about the berm on June 16th, he specifically cautioned him "not to take any chances of tearing his truck up or losing his job."

Chris Sides, a bulldozer operator, was the only witness to the accident of June 16th other than Employee. He testified that earlier in the day, after Employee had backed the truck onto the berm, he "got up on the fuel tank and I told [Employee] to dump at the bottom of the berm." Sides stated that Employee responded by telling him "its fine. And he's like, I think I can get it up there for you." Employee continued to back the truck onto the berm until the accident occurred.

Employee was taken to a nearby emergency room directly from the accident, and spent several days in the hospital. He was treated by Dr. Paul Thomas, an orthopaedic surgeon over the following months. A C-32 from Dr. Thomas was introduced into evidence. He assigned a permanent anatomical impairment of 12% to the body as a whole for Employee's injuries. He indicated that a formal functional assessment would be necessary to determine what, if any, restrictions should be placed upon Employee's activities.

Employee was fifty-four years old at trial. He was a high school graduate, with no additional education. He had worked primarily as an over-the-road truck driver during his adult life. He testified that he had continuing pain, weakness and limited range of motion in his left shoulder as a result of his injury. After being released by Dr. Thomas, he worked briefly for another construction company, and then for his son as a truck driver. He was not working at the time the trial occurred.

Employer proceeded first in the presentation of its case. Employee requested a nonsuit after Employer finished its proof. That application was denied, because Employer had filed the action, and therefore Employee did not have a right to voluntary dismissal. After Employee rested, Employer made a motion to dismiss pursuant to Rule 41.02, Tenn. R. Civ. P. The trial court granted the motion and entered judgment for Employer. Employee has appealed, contending that the trial court erred by finding that his claim was barred because his injury was the result of his willful misconduct.

Standard of Review

This Court reviews a trial court's findings of fact in a workers' compensation case de novo with a presumption of correctness, "unless the preponderance of the evidence is otherwise." Tenn. Code Ann. § 50-6-225(e)(2) (Supp. 2008). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, we must extend considerable deference to the trial court's factual findings. *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). We extend no deference to the trial court's findings when reviewing documentary evidence such as depositions, however. *Id.* As to questions of law, our standard of review is de novo with no presumption of correctness. *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 825 (Tenn. 2003).

Analysis

Tennessee Code Annotated § 50-6-110 (2008) provides, in pertinent part:

(a) No compensation shall be allowed for an injury or death due to the employee's willful misconduct or intentional self-inflicted injury, due to intoxication or illegal drug usage, or willful failure or refusal to use a safety appliance or perform a duty required by law.

(b) If the employer defends on the ground that the injury arose in any or all of the ways stated in subsection (a), the burden of proof shall be on the employer to establish such defense.

Employer's position at trial and on appeal is that Employee engaged in willful misconduct by violating the direct instructions given to him by his supervisors, Mr. Wood and Mr. LaFever, not to back his truck onto the berm. The trial court agreed with that position, and denied the claim. Employee contends that the evidence preponderates against the trial court's finding on this issue. Specifically, Employee argues that the evidence shows that his conduct was merely an error of judgment, rather than willful misconduct. Relying upon *American Mutual Liability Ins. Co. v. Garth*, 125 S.W.2d 140 (Tenn. 1939), he asserts that such errors in judgment do not constitute willful misconduct. Citing *Wright v. Gunther Nash. Min. Constr. Co.*, 614 S.W.2d 796 (Tenn. 1981), Employee also contends that he was not guilty of misconduct because he had emptied his truck in the same manner for several days prior to June 16, 2006, and Employer had acquiesced in that course of conduct. Factually, Employee's positions are based almost entirely upon his own testimony.

In making its ruling, the trial court stated:

[Employee] has a serious injury and I really feel badly for him because of that injury, but I cannot reconcile [his] story. It doesn't make sense to me, because [Employee] testified that he had this discussion with Mr. LaFever the first time when [he] . . . didn't want to dump the material into the ditch, and that Mr. LaFever had told him you can dump it anywhere you need to at that point.

If that was true, then there really was no need for [Employee] to have to go over and have the same discussion with Mr. LaFever [on the morning of June 16].

Also it wouldn't make a lot of sense for Mr. Sides [the bulldozer operator] to be telling [Employee] not to drive up on the berm unless Mr. LaFever had specifically told Mr. Sides don't let him drive up on the berm.

So . . . I just don't believe your rendition of the facts in this case, and as a result of that, I do find that you intentionally ignored the direct orders of your superintendent.

Employer asserts that this amounts to a finding by the trial court that Employee was not a credible witness. Although the court did not use those words, that appears to be a reasonable interpretation of its remarks. That finding is entitled to considerable deference by this Panel. *Whirlpool*, 69 S.W.3d at 167.

In *Rogers v. Kroger Co.*, 832 S.W.2d 538, 541 (Tenn. 1992), the Supreme Court stated that "three elements are needed to constitute willful misconduct for purposes of the statute: (1) an intention to do the act, (2) purposeful violation of orders, and (3) an element of perverseness."

Extending deference to the trial court's implicit finding concerning Employee's credibility, we conclude that the evidence in this record shows that Employee had an accident on June 5 as a result of driving his truck on the berm; that he was told thereafter by two of his supervisors not to drive his truck on the berm; that he was given the same instruction again on June 16, accompanied by a reference to endangering his job; that he was also warned by a co-worker on the same date that it was unsafe to drive the truck onto the berm; and that Employee disregarded those instructions and warnings, resulting in an accident which caused his injuries.

These factual conclusions lead us to the same conclusion reached by the trial court: Employee's injuries were the direct result of his own willful misconduct. In accordance with section 50-6-110, those injuries are, therefore, not compensable under the workers' compensation law.

Conclusion

The judgment is affirmed. Costs are taxed to the appellant, George Haynes, III, and his surety, for which execution may issue if necessary.

ALLEN W. WALLACE, SENIOR JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by George Haynes, III pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to George Haynes, III, and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

KOCH, J., not participating.